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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CLIFFORD PAUL SMITH, JR., Defendant and Appellant.	E047485 (Super.Ct.No. SWF025150) O P I N I O N

APPEAL from the Superior Court of Riverside County. Richard A. Erwood, Judge. Affirmed.

Michael B. McPartland, under appointment by Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Rhonda Cartwright-Ladendorf and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

This case arises from the death of a two-year-old child, Leal, while under the care of defendant, Clifford Smith. At trial, defendant contended the injuries that caused the death of Leal were the result of cardiopulmonary resuscitation (CPR) attempts by either defendant or emergency personnel applied in response to the child's loss of consciousness. The prosecution's theory of the case was that defendant was a strict disciplinarian who struck or squeezed the child in a moment of frustration over her failure to potty train, causing death prior to the application of CPR.

Defendant was convicted on two counts: (1) second degree murder (Pen. Code, § 187, subd. (a)),[1] and (2) assault on a child causing death (§ 273ab). Defendant was sentenced to state prison for 15 years to life on count 1 and 25 years to life on count 2. The sentence on count 1 was stayed pursuant to section 654.

On appeal, defendant contends his conviction on each count must be reversed because there was insufficient evidence he committed any act against the victim with the requisite intent required for conviction of those crimes. We disagree and affirm the judgment.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

II. FACTUAL SUMMARY

A. *Prosecution Case*

Defendant is the father of 10 children between the ages of 7 and 24.[2] The defense developed testimony at trial regarding defendant's consistent involvement in his children's lives and his involvement with children in general as an assistant coach in the community's youth football league.

As of the summer of 2007, defendant and his wife lived with their three minor sons in a two-story house in the City of Perris, with defendant's eldest son, Eric B., often visiting the home.

Sometime in the summer of 2007, defendant's wife's second cousin, the victim's mother (Mother), lost her job and accepted defendant and his wife's invitation for her and her three children to stay at their home. Mother's three children are: A.A., age 15, T.R., age 13, and Leal, age 2. It was agreed that Mother and her children could stay with defendant's family until Mother could recover financially. The nine residents of the home shared four upstairs bedrooms connected by a single hallway: Defendant and his wife shared the master bedroom, and Mother, T., and Leal shared a bedroom down the hallway from the master bedroom.

Shortly after Mother and her children moved into defendant's home it was agreed that defendant would be in charge of potty training Leal. Much of the testimony at trial focused on defendant's methods of potty training. It appears from testimony that

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[2] All ages stated are the ages of the children at the time of trial in July 2008.

defendant initiated a strictly regimented potty training schedule that kept Leal on the potty training toilet for periods exceeding an hour in some instances.

Several witnesses testified that subsequent to defendant's assumption of potty training duties they noticed behavioral changes in Leal when she was in the presence of defendant. Though she had been in regular contact with defendant since her birth, she became increasingly "whiny" and "fearful" around him. According to the testimony of Mother, A., and T., defendant would "pop," or lightly spank, Leal on her hand or leg if she went to the bathroom on herself, causing her to cry. Defendant testified he never "popped" Leal or physically disciplined her.

A couple of weeks prior to Leal's death, Mother noticed horizontal bruises down Leal's back that may have been caused by strikes across her back with a belt. The prosecution developed testimony in its cross-examination of both defendant and his wife that defendant had used a belt to discipline a teenage daughter in the past. Mother testified that defendant was out of town during the time period when the marks were made, and stated that the marks may have been the result of the younger children roughhousing with a belt.

On October 9, 2007, the children left the house for school and defendant's wife went to work, while Mother, Leal, and defendant remained at home. At approximately 1:45 p.m., Mother left the house to pick up A. and T. from school. When she left, defendant and Leal were in the master bedroom, along with Leal's potty training toilet. According to defendant, Leal had "the runs" on his bed at approximately 2:00 p.m.,

messing her clothes and the comforter of the bed. After cleaning everything up, defendant and Leal took a nap.

Mother returned home with A. and T. between 3:20 and 3:30 p.m. Each testified that defendant's two youngest minor sons were downstairs doing their homework at the dining room table, while defendant and Leal were upstairs in the master bedroom. Mother testified that Eric, defendant's eldest son, was also present downstairs when she and her children arrived.

When Mother went upstairs, she found Leal watching television on defendant's bed wearing different clothes than she was wearing when she had left. Defendant told her that Leal had an accident, messing herself, the bed linen, the side of the bed, and the carpet. According to Mother's testimony, defendant told her that she needed to punish Leal for the incident.

After saying "hi" to Leal, Mother left the home shortly thereafter to cash checks that had arrived by mail earlier that day. A. and T. remained at the house doing homework at the dining room table. Mother left the home between 3:30 and 3:40 p.m.

Within a few minutes of Mother's departure, Eric arrived at the home and went upstairs to say "hi" to defendant. According to Eric, defendant was alone in the master bedroom and Leal was lying down in the room that she shared with Mother and T.; Leal smiled at him and appeared to be fine. After saying "hi" to defendant and Leal, Eric returned downstairs and visited with the four children doing their homework at the dining room table.

According to A., Eric did not go upstairs immediately, and instead visited with the children at the dining room table. After 10 or 15 minutes, defendant called A.'s name and A. went upstairs to the master bedroom. Defendant was holding Leal close his chest while rocking her back and forth. Defendant told A. that Leal was not waking up and asked him to go get a glass of water. As A. was leaving the room, he noticed that Leal's lips were a "black and blue" or "grayish" color.

While getting water downstairs, A. told T. that the baby's lips were blue, and that she did not "look good." When A. returned to the master bedroom with the glass of water, defendant was still holding Leal in the same place as before and rocking her back and forth; A. did not notice any signs of life in Leal. Defendant then laid Leal on her back on the bed and began applying CPR on her by pressing on her chest and stomach and breathing into her mouth. When defendant applied compressions to Leal's chest, "greenish-type stuff" came out of her mouth and nose. Thereafter, defendant moved Leal into her and Mother's bedroom and continued his attempts at CPR.

At some point, A. returned downstairs as Eric was beginning to ascend the stairs. Eric testified that he and A. went upstairs after hearing defendant yelling, "What's going on, what's going on?" A. testified that Leal and defendant were in her room, while Eric testified that they were in the master bedroom. Eric testified he saw defendant holding Leal, that "green stuff" was coming out of her nose, and that she was breathing in a labored manner, but not moving. At some point prior to the 911 call, T. went upstairs and observed Leal lying on the bed in the master bedroom.

Defendant asked A. to call Mother. Upon reaching Mother, defendant told her that something was wrong with Leal and that she should hurry home. After hanging up, defendant called 911. Defendant told the 911 operator that "[a]ll kinds of boo-boo and stuff" was coming out of Leal's nose, and he implored the operator to "[p]lease, hurry up." Defendant stated that Leal had been choking and was no longer breathing. Emergency services were dispatched to defendant's home between 4:07 and 4:13 p.m.

Before the paramedics arrived, defendant took Leal downstairs, placed her on the couch, and renewed his attempts at CPR. Eric testified that he heard "rattling breathing" coming from Leal while she was on the downstairs couch. Both A. and T. testified that Leal showed no signs of life, either upstairs or downstairs.

Defendant asked A. and T. to get clothes for Leal, and defendant and T. changed her clothes before the paramedics arrived. The paramedics arrived within minutes of Leal being taken downstairs.

Upon entry to defendant's home, defendant directed the paramedics to Leal, who was unconscious, lying face up on a couch in the living room, with yellow-green mucus surrounding her nose. Though Leal's body was still warm, she had no pulse and was not breathing. Paramedics checked Leal's airway and performed back blows to dislodge any obstructions to her air passage before placing a bag valve mask over her mouth in an attempt to revive her. After attempts to revive her were unsuccessful, Leal was transported by ambulance to a hospital. Paramedics applied CPR to Leal during the ambulance ride to the hospital.

Leal was pronounced dead shortly after arrival at the hospital. The precise time of her death is unknown.

An autopsy was conducted by the sole expert witness, Dr. Aaron Gleckman, a Riverside County forensic pathologist, at the coroner's office in Perris. His examination revealed a half-inch laceration on the left ventricle of Leal's heart, a laceration on the liver, and a large blood clot within the adrenal gland. These injuries led to massive internal bleeding that caused her death within seconds of their infliction. Blood found in Leal's chest cavity and stomach indicated that her heart was beating when the injuries to her heart, liver, and adrenal glands occurred. Dr. Gleckman concluded that the cause of Leal's death was blunt force trauma to the chest and abdomen.

Dr. Gleckman testified the injuries to the victim would have taken seconds to inflict in a single act, such as kicking, hitting, or a "crushing-sort" of compression upon the chest. He further testified the injuries to Leal could not have been inflicted by CPR or other emergency techniques.

Detective LeClair was present during the autopsy. The defense introduced statements in LeClair's police report attributed to Dr. Gleckman indicating that CPR could have caused the injuries to Leal. In particular, the report states: "Dr. Gleckman said he found no hyoid or sternum fractures. He said it would not be uncommon to see lacerations to the heart or liver during chest compressions while performing CPR, but in this case the laceration to the heart was determined antemortem because of the large

amount of blood present in the heart cavity." On cross-examination, Dr. Gleckman denied ever making such a statement.

B. *Defense Case*

Defendant testified at trial. His testimony differs in some respects from the already divergent testimony given by the three witnesses who were present in the house during the critical period between 3:40 and 4:07 p.m. Defendant testified that Mother brought Leal and Leal's potty training seat into his room before going to pick up A. and T. from school. Leal had "the runs" sometime prior to Mother returning home, and had messed herself and the comforter on his bed. After cleaning up the mess, defendant placed Leal on the bed in the room she shared with her sister and Mother.

Defendant testified that Leal was in her room when Mother returned. He told Mother about Leal's accident and told her that it was her responsibility to discipline Leal. During cross-examination, defendant denied that he meant Leal should be physically disciplined for messing the bed and denied ever using physical punishment on Leal at any time.

According to defendant, he gave Mother her checks and she then left the home to cash them. About 10 minutes after Mother left, defendant called downstairs to A., asking him to get defendant a glass of water. Eric came home and went up the stairs as A. was coming up the stairs with the glass of water. Defendant testified that he met A. and Eric at the halfway point of the stairs, and that is when they "first heard the coughing, the choking" coming from Leal's room. He, A., and Eric then went upstairs. Leal was on

her bed, choking. Defendant picked her up and began patting her on the back. Leal was gasping for air and "brownish-green stuff" was coming out of her nose and mouth. He took Leal into the master bedroom, attempted to get her to drink some juice, and then began giving her CPR. Defendant applied three sets of three compressions to Leal's chest. Each time he applied compressions, "brownish-green stuff" came out of her mouth and nose. Leal gasped for air and blinked while he applied CPR to her.

In between attempts at CPR, defendant had A. call Mother, and thereafter made the 911 call. During the 911 call, defendant took Leal downstairs to the living room couch. Defendant testified that Leal was making gargling sounds and gasping for air downstairs before the paramedics arrived. After attempting to clear Leal's airway, defendant applied another set of compressions to Leal. Defendant testified to being "panicked" throughout the incident in question.

Once the paramedics arrived, defendant had no further contact with Leal. The paramedics started CPR on Leal on the floor of the living room, and applied back blows to her when she did not respond to their attempts at CPR.

During the police investigation, defendant told detectives that Leal may have fallen from a counter in the laundry room while in Mother's care earlier in the day.

Defendant testified to being extremely distraught upon learning of Leal's death and he said he wished it had been him, and not Leal, who had died.

During cross-examination, the prosecution questioned defendant on the discrepancies between his testimony and the statement he gave to police detectives.

During the interview with detectives, defendant told them he first heard Leal choking when he was coming out of the bathroom. Defendant testified he did not remember what he had previously said.

Several witnesses testified that defendant was peaceful, trustworthy, kind to children, and known for his patience with children.

III. DISCUSSION

Defendant was convicted of second degree murder and assault on a child causing death. He contends there is insufficient evidence that he committed any act against Leal with the requisite criminal intent required for either crime.

When reviewing a challenge to the sufficiency of the evidence, an appellate court must view the record in the light most favorable to the judgment below to determine whether it discloses substantial evidence to support the verdict. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Substantial evidence is evidence that is of ponderable legal significance; reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson, supra,* at p. 576; *People v. Bassett* (1968) 69 Cal.2d 122, 139.)

"The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) The task before the court is twofold. First, the court must resolve the issue in the light of the whole record, not isolated pieces of evidence put

forward by the defendant. (*People v. Bassett, supra,* 69 Cal.2d at p. 138; *People v. Johnson, supra*, 26 Cal.3d at p. 577.) Second, the court must judge whether the evidence of each of the essential elements is substantial; it is not enough for the defendant to point to *some* evidence supporting the finding. (*People v. Bassett, supra*, at p. 138; *People v. Johnson, supra*, at p. 577.) However, the court cannot "reweigh the evidence, resolve conflicts in the evidence, draw inferences contrary to the verdict, or reevaluate the credibility of witnesses." (*People v. Little* (2004) 115 Cal.App.4th 766, 771.)

Suspicion or speculation does not amount to substantial evidence. (*People v. Raley* (1992) 2 Cal.4th 870, 889-891.) Circumstantial evidence is viewed under the same standard as any other type of evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) "An appellate court must accept all logical inferences that the jury might have drawn from the circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.) An eyewitness is not necessary to support a conviction, as the prosecution may rely on circumstantial evidence to connect a defendant to the charged crime. (See *People v. Reilly, supra,* 3 Cal.3d at p. 424.) "[T]he . . . question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia, supra*, 443 U.S. at p. 319.)

A. *Substantial Evidence Supports Defendant's Second Degree Murder Conviction*

Second degree murder is the unlawful killing of a human being with malice aforethought, but without the additional elements, such as willfulness, premeditation, and

deliberation, that would support a conviction for first degree murder. (§§ 187, subd. (a), 189; *People v. Knoller* (2007) 41 Cal.4th 139, 151.) Malice may be express or implied. (§ 188.) "Malice is implied . . . when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life." (*People v. Cook* (2006) 39 Cal.4th 566, 596; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1221-1222; *People v. Knoller, supra,* at p. 157.)

Implied malice is comprised of two components; one physical and one mental. (*People v. Taylor* (2004) 32 Cal.4th 863, 868.) The physical component of implied malice is satisfied by the performance of an """"act, the natural consequences of which are dangerous to life[.]""""" (*People v. Watson* (1981) 30 Cal.3d 290, 300; *People v. Chun* (2009) 45 Cal.4th 1172, 1181.) "An act is dangerous to life, for purposes of implied malice, when there is a high probability it will result in death." (*People v. Calderon* (2005) 129 Cal.App.4th 1301, 1310; *People v. Watson, supra,* at p. 300.) Implied malice may be proven by circumstantial evidence, including consideration of circumstances preceding the fatal act. (*People v. James* (1998) 62 Cal.App.4th 244, 277-278 [Fourth Dist., Div. Two]; *People v. Mills* (1991) 1 Cal.App.4th 898, 919-920.)

Here, there is sufficient circumstantial evidence to support a reasonable inference that defendant performed an act against Leal, the natural consequence of which was dangerous to her life. There was testimony placing defendant alone with Leal just prior to her death, testimony that Leal showed no signs of life from the moment others became

aware of the situation upstairs, and testimony from Dr. Gleckman that Leal died within seconds from a crushing injury that could not have been inflicted by CPR or other accident. The jury could reasonably conclude that the injury that caused Leal's death was not caused by CPR and was inflicted by the only person who was with Leal when the injury occurred. This conclusion is further supported by testimony that defendant was frustrated with Leal's failure to potty train and he had previously used force on the child when she did not meet his expectations.

The mental component of implied malice is that a defendant "'knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life.'" (*People v. Patterson* (1989) 49 Cal.3d 615, 626; *People v. Chun, supra,* 45 Cal.4th at p. 1181.) Simply put, the mental component of implied malice "requires a defendant's awareness of engaging in conduct that endangers the life of another . . . ." (*People v. Knoller, supra,* 41 Cal.4th at p. 143.) It is not necessary to prove the defendant was aware that his conduct had a high probability of resulting in death. (*Ibid.*)

The jury in this case could reasonably conclude defendant acted with the requisite knowledge based upon evidence concerning the severity of Leal's injuries. According to Dr. Gleckman, the child suffered a "quite large hole" in her heart, a laceration of her liver, and a hematoma within the adrenal gland. These injuries were caused by blunt force trauma. The child was, he said, likely "crushed to death." He described the amount of force necessary to cause the injuries as "a very large amount of compression force, " and an "extreme compression on her chest." He explained that there "had to be an

intentional application of the force, most likely from a crushing injury. But it could also have been from [a] very purposeful and powerful kick, or punch even." He clarified that by this he meant the force of a grown person punching or kicking "as hard as they could." The jurors could reasonably conclude from such evidence that defendant, in using the kind of "extreme" force described by Dr. Gleckman, must have been aware that the use of such force against a two-year-old child would endanger her life.

Defendant contends he was convicted on mere speculation, and that the absence of certain types of evidence undermines the solidity of proof relied upon to support the finding of guilt. He relies primarily on *People v. Blakeslee* (1969) 2 Cal.App.3d 831 (*Blakeslee*). In *Blakeslee*, the defendant was convicted of second degree murder for the shooting death of her mother. (*Id*. at p. 836.) The defendant lived with her brother and mother and was shown to have been at the scene immediately before and after the shooting occurred. (*Id*. at pp. 833-835.) On the evening of the slaying, the defendant's brother, Michael, had an argument with his mother immediately preceding her murder. (*Id*. at p. 833.) The defendant and Michael left the apartment at 7:20 p.m. (*Ibid.*) The defendant contended that when she returned at 7:40 p.m., she found her mother dead on the floor of the apartment. (*Id*. at p. 836.) The coroner testified that the bullets that killed the victim could not be used to identify the gun used in the killing. (*Id*. at p. 835.) However, he stated that the wounds in the victim's body were consistent with the type of wounds made by .22-caliber rifle bullets. (*Ibid*.) No weapon was ever produced or specifically identified with the murder. (*Id*. at p. 836.)

The defendant's brother testified that he kept a .22-caliber single shot rifle in his room, and that the rifle was missing after the murder. (*Blakeslee, supra,* 2 Cal.App.3d at p. 835.) He further testified that the defendant knew where the rifle and ammunition were located, and that she had used the rifle on several occasions for target practice. (*Ibid.*) The defendant admittedly lied to police officers about her movements on the night in question and her knowledge of the presence of the gun in the apartment. (*Id*. at p. 836.) She testified that she had lied to protect her brother from prosecution. (*Id.* at p. 838.)

In overturning the conviction, the Court of Appeal noted the conviction was based solely on the defendant's presence at the scene of the crime five to ten minutes before and after the crime, and on the fact she told a false story to police about her movements that night. (*Blakeslee, supra*, 2 Cal.App.3d at p. 840.) The court noted that an equally strong case could be made against the defendant's brother, Michael, stating: "On the evidence in this record we could thus bring together opportunity, motive, propensity, and even work in [the defendant's] falsehoods, in a plausible reconstruction of the crime with Michael as the protagonist instead of [the defendant]." (*Ibid*.) The court reasoned that evidence capable of such manipulation lacks substantial probative value. (*Ibid*.)

We agree with defendant that there are several similarities between *Blakeslee* and the case at hand. The cases are factually similar in that both defendants were at or near the scene of the incident at the time of its occurrence and had opportunity to commit the acts in question. Furthermore, actual or perceived falsehoods offered by each defendant

regarding their actions during the incidents in question form the basis of unfavorable inferences against them. Moreover, in both cases there is arguably an absence of evidence that one would normally expect to find in a murder prosecution. In *Blakeslee*, the court noted that there were no witnesses to the crime, there was no murder weapon in evidence, no identification of the type of bullet or gun used in the murder, and no evidence establishing a link between the alleged murder weapon and the defendant, such as fingerprints or powder burns. (*Blakeslee, supra*, 2 Cal.App.3d at pp. 839-840.) Here, the absence of evidence of Leal's time of death creates uncertainty as to when the injury that caused her death was inflicted. None of the people downstairs heard any noise coming from upstairs during the period when the assault on Leal allegedly took place. Additionally, the coroner did not report any external bruising on Leal's chest or stomach that corroborates the coroner's theory of an "intentional crushing-sort of injury."

Unlike *Blakeslee,* however, the jury in this case was presented with testimony indicating that no other person could be responsible for the application of force that caused Leal's death. The testimony of first responders establishes a rational inference that Leal was dead before they arrived. Dr. Gleckman testified CPR was not the cause of Leal's death. A.'s testimony that Leal's lips were blue and she was not moving when defendant first called him upstairs supports the inference that Leal was dead before any attempt at CPR was made. Dr. Gleckman's testimony that the injury could not have been caused by a fall or other accidental contact shows an intentional application of force. Lastly, Mother's and A.'s testimony places defendant alone in the room with Leal

immediately prior to her death. These factual differences distinguish the present case from *Blakeslee*. That case, therefore, is not controlling here.

The prosecution presented the jury with a series of factual circumstances that logically lead to defendant's culpability. Defendant's argument that incorrectly applied CPR could have caused the death of Leal misses the point. Under the substantial evidence standard of review, the trier of fact's verdict cannot be reversed merely because there is a feasible alternative explanation that would negate a finding of implied malice. As noted above, we cannot reweigh the evidence to resolve conflicts in the evidence, draw inferences contrary to the verdict, or reevaluate the credibility of witnesses; this court must give deference to the jury's determination that the evidence established that Leal's death was not caused by CPR. (See *People v. Little*, *supra*, 115 Cal.App.4th at p. 771.)

B. *Substantial Evidence Supports Defendant's Conviction of Assault on a Child Causing Death*

We affirm defendant's conviction for assault on a child causing death based on the same facts used to affirm his conviction for second degree murder. There were sufficient facts upon which the jury could infer that defendant wrongfully applied force to Leal.

Section 273ab provides: "Any person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for 25 years to life. . . ." The statute

elevates the punishment for assault when the following four special facts exist: (1) the assault is on a child under age eight; (2) the assault is by a caregiver; (3) the assault is by means of force likely to cause great bodily injury; and (4) the assault results in death. (*People v. Norman* (2003) 109 Cal.App.4th 221, 226-227.) It is a child abuse homicide statute that serves the State of California's compelling interest in protecting vulnerable children from abuse by their caretakers. (*Id.* at p. 227; *People v. Malfavon* (2002) 102 Cal.App.4th 727, 740-741 (*Malfavon*); *People v. Albritton* (1998) 67 Cal.App.4th 647, 659-660.)

In the case at hand, Leal was two years old, defendant was admittedly at least a part-time caregiver to Leal, and Leal died. The only issue argued by defendant is whether there was sufficient evidence that he assaulted Leal.

Section 240 defines assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." The crime requires "an intentional act and actual knowledge of . . . facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*People v. Williams* (2001) 26 Cal.4th 779, 790.)

Whether the mens rea for assault is present is "determined by the character of the defendant's willful conduct considered in conjunction with its direct and probable consequences." (*People v. Colantuono* (1994) 7 Cal.4th 206, 217.) A person has the requisite intent for assault when a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally, and probably result in a

battery. (*People v. Williams, supra*, 26 Cal.4th at p. 788; *People v. Felix* (2009) 172 Cal.App.4th 1618, 1628.) The inquiry focuses on the nature of the act, not on the perpetrator's specific intent in doing the act. (*People v. Williams, supra,* at p. 786.)

In discussing assault within the context of section 273ab, our state Supreme Court recently stated: "'Although the defendant must intentionally engage in conduct that will likely produce injurious consequences, the prosecution need not prove a specific intent to inflict a particular harm.' [Citation.]" (*People v. Wyatt* (2010) 48 Cal.4th 776.) Thus, "the requisite mens rea may be found even when the defendant honestly believes his act is not likely to result in such injury." (*Id.* at p. 781.)

The present case in not unlike *Malfavon, supra,* 102 Cal.App.4th 727. There, the defendant was convicted of both second degree murder and assault on a child causing death. There were no eyewitnesses to the injury that caused the child's death other than the defendant. (*Id.* at pp. 731-732.) The defendant contended the injuries that caused the death of the child were the result of him falling on the stairs while carrying the child. (*Id.* at p. 732.) Medical experts opined at trial that the blunt force trauma injuries to the child's head were unlikely to have been caused by the type of fall described by the defendant. (*Id.* at p. 733.)

In affirming the defendant's conviction, the appellate court in *Malfavon* reasoned that there was substantial circumstantial evidence lending credible support to the inference that the defendant was responsible for the child's injuries: he was left alone in a car with the uninjured child before the child's mother went to the upstairs apartment,

there was a blood trail from the car seat the child was in to outside of the car, and there were traces of the child's blood on the shirt worn by the defendant on the date in question. (*Malfavon, supra,* 102 Cal.App.4th at p. 735.) The court noted that the defendant's version of events "was, at best, lacking in plausibility." (*Id.* at p. 736.)

Here, as in *Malfavon,* defendant was alone with the victim when the injury causing death was committed. Both juries were presented with alternative explanations for the injury to the victims and rejected them in favor of the theory advanced by medical experts. In both cases, evidence of defendant's conviction for assault on the child victim is entirely circumstantial. The substantial evidence standard of review requires the court to give deference to the logical inferences drawn by the jury from circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793; *People v. Maury, supra*, 30 Cal.4th at p. 396.)

Here, the jury could have logically inferred that defendant had previously struck Leal when she failed to meet his potty training expectations, that he struck her in a moment of frustration, and that such force killed her prior to the application of CPR. Thus, there is substantial evidence of the requisite intent required to sustain defendant's conviction of violating section 273ab based upon the jury's finding that defendant was responsible for the injuries to Leal.

IV. DISPOSITION

The judgment is affirmed.

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/s/ King
J.

We concur:

/s/ McKinster
Acting P.J.

/s/ Richli
J.